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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner*,

v.

VICTORY TRANSPORT INCORPORATED, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR M. BECKER
839 17th Street, N.W.
Washington 6, D. C.

HARRY WALLACH
475 Fifth Avenue
New York 17, New York

Counsel for Petitioner

Of Counsel:

NIXON, MUDGE, ROSE,
GUTHRIE & ALEXANDER
20 Broad Street
New York, New York

January 7, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Comisaria General de Abastecimientos y Transportes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered in the above-entitled proceeding on September 9, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 336 F. 2d 354 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The memorandum opinion of the District Court for the Southern District of New York is reported at 232 F. Supp. 294 and is reprinted in Appendix B hereto, p. 20a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1964. On November 28, 1964, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including January 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an official agency of a foreign sovereign, by agreeing in a charter party to arbitrate disputes thereunder in New York, can be held to have consented, by implication, to the subsequent assertion of *in personam* jurisdiction by a federal district court in New York to compel arbitration of such a dispute under the Federal Arbitration Act.

2. Whether, under the Federal Arbitration Act and the Federal Rules of Civil Procedure incorporated therein, the extraterritorial transmittal of process by registered mail pursuant to an order of a federal district court constitutes valid service of process sufficient to sustain *in personam* jurisdiction with respect to an official agency of a non-consenting foreign sovereign.

STATUTES AND RULES INVOLVED

Section 4, United States Arbitration Act, 9 U.S.C. § 4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

Rule 4(d), Federal Rules of Civil Procedure:

> (d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service

with such copies as are necessary. Service shall be made as follows:

* * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of proce[illegible] and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4(e), Federal Rules of Civil Procedure:

SAME: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule.

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.*

Rule 4(f), Federal Rules of Civil Procedure:

> TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . .

STATEMENT OF THE CASE

The petitioner in this case, Comisaria General de Abastecimentos y Transportes, is an official branch of the Spanish Ministry of Commerce, an arm of the sovereign Government of Spain. Its offices are located in Madrid, Spain. No offices are located in New York or elsewhere in the United States.

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* At the time the instant case arose, and prior to the 1963 revision quoted above, Rule 4(e) was entitled "Same: Other Service", and read as follows:

> "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order."

On February 21, 1963, the respondent Victory Transport Incorporated filed in the United States District Court for the Southern District of New York a "Petition to Compel Arbitration." The petition alleged the following to be facts:

On or about November 1, 1961, respondent herein, as owner, and the Comisaria General, as voyage charterer, entered into an agreement of charter at New York. Under that agreement, the Comisaria General chartered from respondent the vessel HUDSON for a voyage from "one safe U.S. Gulf port" to "one or two safe North Spanish Ports (Pasajes and Vigo included) or one or two safe South Atlantic Ports (Huelva, Sevilla & Cadiz) or one or two safe Spanish Mediterranean Ports, one safe berth each port." Thereafter, the HUDSON was tendered to the Comisaria General and was loaded with a bulk cargo of wheat. Pursuant to the Comisaria General's orders, the vessel proceeded to the Port of Vigo, North Spain, and thence to Port Musel. Cargo was discharged at both of these ports at berths alongside wharves selected and designated by the Comisaria General. Both ports, however, were allegedly unsafe for a vessel the size of the HUDSON; and as a result the vessel was damaged by being pounded against the wharves by heavy seas and wind. Respondent claimed that the Comisaria General had violated the charter by designating unsafe ports and berths and claimed damages approximating $201,391.72.

The opening paragraph of respondent's petition alleged that "Save for the written agreement to arbitrate hereinafter set forth, this Honorable Court would have jurisdiction in admiralty of the subject matter of a suit arising out of the controversy as to which . . . [respondent] now seeks to compel arbitration." The

tenth paragraph of the petition set forth the arbitration clause contained in the charter:

> "Should any dispute arise between Owners and Charterers, the matter in dispute shall be referred to three persons in New York, one to be appointed by the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Respondent allegedly demanded arbitration of this matter on or about October 2, 1962, nominated its arbitrator, and requested the Comisaria General to appoint its arbitrator promptly.

Respondent alleged that the Comisaria General failed to nominate an arbitrator under the arbitration clause or to pay the alleged damages and moved the court "for an order designating and appointing an arbitrator to act under said agreement as the arbitrator appointed by . . . [the Comisaria General], and directing that the arbitration proceed in the manner provided in such agreement."

While the petition itself made no reference to Section 4 of the United States Arbitration Act, 9 U.S.C. § 4, the accompanying notice that the petition would be brought on for argument on a specified date referred to the petition as one "pursuant to 9 U.S.C.A. § 4 to compel arbitration of disputes arising under the agreement of charter." Subsequently, the respondent secured an *ex parte* order from Judge Dawson of the Southern District of New York, dated March 22, 1963. That order, after reciting that respondent had proved that it would be unable to effect personal or substituted

service upon the petitioner Comisaria General within New York, directed "that the petition and notice of petition to compel arbitration in the above-entitled matter may be served upon the . . . [petitioner Comisaria General] by sending copies thereto to it at Almagro No. 33, Madrid, Spain, by registered mail." Copies of the petition and notice of the petition were mailed to that address pursuant to the order.

Following several adjournments of the hearing on the petition, the petitioner Comisaria General moved for an order (a) vacating the March 22 order permitting service by registered mail as unauthorized by law, (b) vacating the service upon the Comisaria General effected pursuant to such order, (c) dismissing the petition on the ground of the alleged sovereign immunity of the Comisaria General, and (d) dismissing the petition as not within the jurisdiction of the District Court.

The claim of sovereign immunity was accompanied by an affidavit of Juan Lugo, Consul of Spain in New York City, stating that the Comisaria General "is a branch of the Ministry of Commerce of the sovereign Government of Spain" and that the instant proceeding was based upon "transactions wherein the Comisaria General de Abastecimientos y Transportes arranged for the purchase of American surplus wheat and the transportation thereof from the United States to Spain, not as a commercial transaction, but for the purpose of promoting the supply of this most fundamental product pursuant to the policy of the American Foreign Aid Program and in accordance with the public purpose of such aid." The affidavit further stated that "The sovereign Government of Spain disclaims any liability arising out of the transaction herein and

strenuously asserts its sovereign immunity from suit herein" and that, moreover, "the contract herein did not confer power on this Court to seize jurisdiction of this alleged controversy."[1]

On October 18, 1963, following the effective date (July 1, 1963) of the new Rule 4(i) of the Federal Rules of Civil Procedure, which provides alternative ways of effecting service in a foreign country, respondent sought to take advantage of subsection (1) (D) of this new Rule. That subsection permits service by "any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." But the clerk declined to dispatch such papers without an order of the court; and Judge Dawson, believing that the proposed order was identical to the one he had signed on March 22, 1963, declined to sign an additional *ex parte* order. Respondent thereupon sent its own purported process by registered mail, addressed to the Comisaria General in Madrid, Spain. The validity of this second so-called service, however, was never passed upon by the courts below.

The District Court, speaking through Judge Murphy, filed a memorandum opinion dated November 13, 1963, overruling petitioner's objections to service of process and to the court's jurisdiction and granting respondent's motion to compel arbitration. The court

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[1] The Court of Appeals noted in its opinion (footnote 7) that during the course of the appeal in this case the Spanish Ambassador to the United States addressed a letter to that court further claiming immunity for the Comisaria General. This claim was treated as properly presented and it was noted that the respondent did not dispute the "sovereign status" of the Comisaria General. See pp. 7a-8a, *infra*.

held that by entering into an agreement providing for arbitration in New York the parties had consented to New York's jurisdiction and that the service of process which was effected on April 1, 1963, was significant only to the extent that it was required to avoid a violation of due process. The defense of sovereign immunity was rejected on the ground that under the State Department's policy embodied in the "Tate Letter" this was a commercial transaction to which immunity did not apply. And since the court felt that none of the petitioner's acts could be considered official acts, the Act of State Doctrine did not preclude the exercise of jurisdiction.

In its order formalizing the foregoing rulings, the District Court directed that the petitioner Comisaria General, within 14 days, nominate an arbitrator in accordance with the arbitration agreement. The order further provided that, in the event of the Comisaria General's failure to nominate an arbitrator, "application may be made to the Court for nomination by the Court of the person to serve as the arbitrator appointed by . . . [the Comisaria General]." *Infra,* p. 24a.

The Court of Appeals affirmed the resulting District Court judgment in all respects. After an extended discussion of the commercial nature of the transaction involved in the charter agreement and the inapplicability of the sovereign immunity doctrine, the Court of Appeals ruled that the District Court had *in personam* jurisdiction to enter the order compelling arbitration—since by agreeing to arbitrate charter disputes in New York the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel arbitration in New York. The court further held that, since the Comisaria General had consented beforehand to the jurisdiction of the District Court, the sole function of the challenged extraterritorial

service of process was to notify the petitioner that proceedings had commenced. Moreover, said the court, the provision of § 4 of the Arbitration Act that service of the petition to compel arbitration shall be in the manner provided in the Federal Rules of Civil Procedure was satisfied in two respects: (1) service was proper under Rule 4(d)(3), dealing with service on nongovernmental foreign corporations, since there is no basis for treating branches of foreign sovereigns differently from foreign corporations; and (2) service was proper under Rule 4(e), dealing with service pursuant to a statute of the United States or an order of court, since the service here was effected pursuant to Judge Dawson's order of March 22, 1963.

REASONS FOR GRANTING THE WRIT

For the first time in American jurisprudence a federal court has affirmatively asserted *in personam* jurisdiction over an agency of a foreign sovereign without its express consent and without its appearance or other participation in the litigation.[2] That fact alone

[2] The Court of Appeals, in support of its statement that there is no bar to the assertion of *in personam* jurisdiction over a foreign sovereign, cited *Kunglig Jarnvagsstryrelsen* v. *Dexter & Carpenter*, 300 F. 891 (S.D.N.Y.), aff'd 32 F. 2d 195 (C.A. 2). But in that case a Swedish corporation sued an American corporation on a commercial transaction; not until the defendant counterclaimed for breach of contract did the Swedish corporation attempt to rely upon its sovereign status as a defense to the counterclaim. The court held that this "is not an appearance by the kingdom of Sweden as a party to the suit, nor the assertion of immunity by that kingdom. It is an assertion by plaintiff corporation of a claim of sovereign immunity. But the assertion of the sovereign's immunity cannot be made by a private party litigant." 32 F. 2d at 200. Thus the case is no authority for an assertion of *in personam* jurisdiction over a sovereign entity in the first instance. See *National City Bank* v. *Republic of China*, 348 U.S. 356, with respect to the assertion of a counterclaim against a plaintiff foreign sovereign.

has such obvious international significance, disruptive as it may be of our foreign legal relationships, as to warrant this Court's most careful scrutiny of the decision below.

The immediate impact of the decision is a direction by an American court that a foreign sovereign nominate an arbitrator within 14 days, failing which that court will appoint an arbitrator on behalf of the sovereign. Such an order has been entered without any appearance before the court by the sovereign, without any express or knowing consent directed to the court that is seeking to assert *in personam* jurisdiction, without any seizure of the sovereign's assets within the court's territorial jurisdiction, and without any power in the court to enforce its order by way of contempt proceedings. In short, a friendly foreign nation has been summarily ordered, by notice mailed to that nation's capital city, to perform in New York a written contract with a private corporation. See pp. 24a-25a, *infra*.

The wider impact of such a jurisdictional direction may well be to undermine the long-established rule that "upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent." *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134; and see *The Exchange* v. *M'Faddon,* 7 Cranch 116; *Berizzi Bros. Co.* v. *The Pesaro,* 271 U.S. 562. While a sovereign may consent to suit, to draw an implication of consent from a prior agreement with a private party and to hold the foreign sovereign amenable to suit here without any form of consent directed toward the court itself can have unsettling effects upon our legal relations with foreign nations. If the decision below is sustained, foreign courts might well see fit to take

retaliatory action against the United States, which has in the past asserted its sovereignty to avoid suits to compel arbitration in foreign courts. See *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 131 L.T. 388, 40 T.L.R. 601.

Two major jurisdictional issues emerge from the decision below that reflect these possible consequences and that are of vital significance under both federal and international law: (1) whether the consent of a foreign sovereign to the assertion of *in personam* jurisdiction can be drawn by implication from a prior agreement in a charter party to submit disputes thereunder to arbitration, and (2) whether service of process upon such a sovereign can be effected under the Federal Rules of Civil Procedure. These issues find no definitive answers in the prior decisions of this Court—if for no other reason than the very novelty of the effort to assert such *in personam* jurisdiction over an unwilling but friendly foreign sovereign.

Moreover, these issues necessarily precede any consideration of the traditional sovereign immunity doctrine, which occupied so much of the attention of the court below. Whatever the impact on the applicability of that doctrine of what the court below found to be commercial transactions, the sovereign nature of the entity involved poses serious jurisdictional problems for any court in the United States. Quite apart from the ultimate issue as to the availability of the defense of sovereign immunity, once jurisdiction to decide that issue has been established, how and under what circumstances does the sovereign become subject to such court's *in personam* jurisdiction? That is the basic type of problem involved in this case, a problem

similar to that faced by Chief Judge Brennan in *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y.), aff'd *per curiam,* 238 F. 2d 400 (C.A. 2). In ruling that there was no method under the Federal Civil Rules for effecting service on the Dominion of Canada, Judge Brennan wrote (p. 749):

> "It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by service of process or by the defendant's appearance. Ex parte Peru, 318 U.S. 578, at page 587. Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.
>
> "Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision. . . ."

The resolution of this critical jurisdictional problem by the court below is not only unsatisfactory and novel but in direct conflict with both domestic and foreign precedent. As in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 407, the grant of certiorari becomes appropriate here "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."

1. The conflict as to whether a sovereign entity can be said to have given prior consent, by signing an arbitration agreement with a private party, to the assertion of a court's in personam jurisdiction

In holding that a sovereign entity, by agreeing to submit charter party disputes to arbitration in New York, has agreed to submit to the *in personam* jurisdiction of a federal court in New York, the court below has rendered a decision of major significance in international law, one that is directly contrary to pertinent decisions of English tribunals. This conflict concerning the jurisdictional consequences of virtually identical commitments by sovereign entities to submit disputes to arbitration[3] has created a disparity between the treatment of sovereigns by American and English courts. Review thus becomes appropriate, particularly to determine if uniformity is desirable in this area of international law. Cf. *Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493; *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U.S. 430, 434; *Standard Oil Co.* v. *United States*, 340 U.S. 54, 59.[4]

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[3] The arbitration clause at issue in this case is a uniform clause known as the New York Produce Exchange Arbitration Clause, frequently contained or inserted in charter party agreements made in the United States and Canada. Similar agreements to submit contract disputes to arbitration at a given place, whatever the differences in precise language, are in widespread use in the United States, England and other foreign countries. The general agreement to arbitrate, not the precise or peculiar language of the New York Produce Exchange Arbitration Clause, has given rise to the holding that the petitioner in this case thereby consented to the *in personam* jurisdiction of the federal court in New York.

[4] Among the reasons prompting review in the three cited cases were alleged conflicts between lower federal court decisions and those of English courts relative to the interpretation and enforcement of certain clauses of marine insurance contracts. The similarity of the language used in policies issued in the United States and England was said to make uniformity in interpretation desirable.

English tribunals, including the House of Lords, have consistently taken the position that a foreign sovereign cannot be said to have consented to a court's *in personam* jurisdiction solely by reason of a prior arbitration agreement made with a private party. To be effective, a sovereign's consent to such jurisdiction must be *coram judice,* addressed to the court at or after the institution of the suit in question. This doctrine stems from the decision in *Mighell* v. *Sultan of Jahore*, [1894] 1 Q.B. 149, where Lord Esher ruled that in determining whether a sovereign has elected to submit to a court's jurisdiction the election must be made "only when the court is about or is being asked to exercise jurisdiction over him, and not any previous time. . . . It follows from this that there can be no inquiry by the court into his conduct prior to that date."

The leading instance of the application of this doctrine in the context of an arbitration agreement is the decision of the House of Lords in *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797. There a sovereign's agreement with a private corporation to submit contract disputes to arbitration under the British Arbitration Act was held not to constitute a submission by the sovereign to an English court's jurisdiction to enforce an award. The opinions in the case reiterated that a sovereign's consent must be in the form of "action taken towards the Court itself" and must constitute "something that really evinces an intention to submit." A.C. at 810, 829. And as explained by Viscount Cave, A.C. at 810, if the sovereign refuses to submit to the agreed-upon arbitration "he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court."

Taking full advantage of this doctrine, the United States Shipping Board asserted its sovereign status and avoided an *in personam* suit brought in an English court in *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 131 L.T. 388, 40 T.L.R. 601. There, as in the instant case, the sovereign entity had agreed in a charter party to submit disputes thereunder to arbitration (in England) and subsequently declined to proceed to arbitration of such a dispute. Rejecting the contention that the United States Shipping Board had waived its immunity by agreeing to submit disputes to arbitration, Bankes, L. J., wrote that "it requires a great deal more than a submission to arbitration to amount to a waiver of immunity of the sovereign when he is sued in a court of law *in personam*: and I think . . . the question of waiver arises when the question of immunity is raised and can be challenged." [1924] All Eng. Law Rep. at 188.[5]

More recently, in *Kahan* v. *Federation of Pakistan*, [1951] 2 K.B. 1003, where the Pakistan Government had agreed in a contract with a private party "to submit for purposes of this agreement to the jurisdiction of the English courts," Jenkins, L. J., ruled (p. 1012) that "it is established beyond question by authorities

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[5] Bankes, L.J., also stated, in language peculiarly appropriate to the instant case, *Ibid.*, 187, that "the question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken *in personam*, and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign state." Quoted with approval by Jenkins, L.J., in *Baccus* v. *Servicio Nacional Del Trigo*, [1956] 3 All Eng. Law Rep. 715, 733.

binding on this court[6] that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the court—will suffice." To the same effect, see opinion of Supreme Court of Queensland in *U.S.A.* v. *Republic of China*, [1950] Q.W.N. 5 (Philip, J.).[7]

In short, the English courts in these cases have insisted that the sovereign's consent be found solely in the sovereign's relationships with the court. Without such consent, vis-a-vis the court, these English tribunals have applied the universal rule of international law that "the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages." Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485, 490. This Court, of course, has always recognized this basic principle of international comity. See, e.g., *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134. But it has not had occasion to consider the applicability of

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[6] The binding authorities referred to were *Mighell* v. *Sultan of Jahore*, [1894] 1 Q.B. 149, and *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797.

[7] See also the Belgian decision in *Gouvernment Ottoman* v. *la Societe de Sclessir*, Civil Tribunal, Antwerp, November 11, 1876, Pasicrisie, 1877-3-28, holding "that an agreement 'to proceed before the ordinary jurisdiction,' could not be interpreted as an expression on the part of the contracting state to submit to jurisdiction other than that of its own courts." Quoted in Allen, The Position of Foreign States Before National Courts (1933), p. 23.

the principle in the instant context of a prior agreement to arbitrate.

The decision below, which finds no precedent in American law, is in direct conflict with the foregoing English decisions on the application of this principle of international law. The court below has held that a sovereign entity effectively waived its immunity and submitted to the jurisdiction of a federal court in New York merely by agreeing beforehand to submit disputes to arbitration in New York. And that so-called submission was in the form of a prior agreement with a private contracting party; the sovereign said nothing, did nothing and agreed to nothing in the way of consent vis-a-vis the federal court in New York at or after the commencement of the litigation. By virtue of the English precedents, the sovereign entity cannot be said to have consented to the invocation of that court's *in personam* jurisdiction.

The treatment thus accorded foreign sovereigns by the English courts has been said to be "much more logical, since willingness to be sued can be determined only by the state of mind at the moment of the litigation, and there is no more reason why the agreement to submit [or to arbitrate] should not be voidable than the contract sued upon." Allen, The Position of Foreign States Before National Courts (1933), p. 20. Indeed, the contrary rule followed below would seem inherently elusive and unrealistic. Can it truthfully be said that this petitioner, an agency of the sovereign Government of Spain, knowingly consented, when it signed the charter party in 1961, to the subsequent invocation of the *in personam* jurisdiction of the federal district court in New York? Did it thereby also consent to the *in personam* jurisdiction of a New York

state tribunal—had respondent sought to compel arbitration in such tribunal? Or, since the agreement to arbitrate in New York is enforceable under the Federal Arbitration Act in any other federal district court in which the petition is filed, *Continental Grain Co.* v. *Dant & Russell,* 118 F. 2d 967, 969 (C.A. 9),[8] did the Comisaria General consent—by merely agreeing to arbitrate in New York—to the *in personam* jurisdiction of all federal tribunals in the United States in which a petition might be filed? To conclude from the generalized wording of the arbitration agreement that this foreign sovereign entity waived its immunity from process and consented to be sued in this particular federal court in New York—or in any other particular tribunal—"is surely to move in the world of Alice in Wonderland." *Olberding* v. *Illinois Central R. Co.,* 346 U.S. 338, 341. To treat a foreign sovereign in such a manner hardly seems consonant with the traditional attitude of this Court that the judiciary should not embarrass the foreign relations of the United States "by assuming an antagonistic jurisdiction." *United States* v. *Lee,* 106 U.S. 196, 209.

In support of its decision, the court below cited its own prior determinations in *Farr* v. *Cia Intercontinental de Navigacion,* 243 F. 2d 342 (C.A. 2), and

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[8] Under § 4 of the Arbitration Act, the hearing and proceedings under the terms of the arbitration agreement "shall be within the district in which the petition for an order directing such arbitration is filed." The *Continental Grain* case, 118 F. 2d at 969, involved the same New York Produce Exchange Arbitration Clause at issue in the instant case, calling for arbitration of disputes in New York. The petition to compel arbitration was filed in a federal district court in Oregon; that court directed that the agreement be enforced and that the arbitration proceedings take place in Oregon. The Ninth Circuit affirmed. See also *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198.

Orion S. & T. Co. v. *Eastern States Petro. Corp. of Panama,* 284 F. 2d 419 (C.A. 2). But the *Farr* and *Orion* cases involved arbitration clauses signed by private corporations, neither of which enjoyed any sovereign status. The court below stated that it could "see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." See p. 17a, *infra.* But the difference between the two entities would appear both obvious and decisive. A foreign sovereign, including a commercial branch thereof, has a status of immunity under international law, a status which an ordinary foreign corporation does not possess. And the sovereign entity has the privilege of waiving that immunity only to the extent that it sees fit or desires. As this Court noted in *Beers* v. *Arkansas,* 20 How. 527, 529, a sovereign, unlike a private corporation, "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." Determining when a sovereign's consent or waiver has occurred brings into operation many considerations of international law and comity not present when dealing with a foreign corporation's submission to jurisdiction. The cited English decisions illustrate those considerations and indicate the narrow area within which the sovereign's consent is to be found. That area was clearly not involved in this case.

The result of a decision contrary to that reached below is not, as the Court of Appeals suggests (p. 17a, *infra*), "to render the arbitration clause a nullity." A cause of action for breach of that clause would certainly lie in the courts of Spain or in any other tribunal

which could obtain *in personam* jurisdiction over the sovereign entity.

The appropriateness of reviewing the decision below is underscored by the pendency in the Second Circuit of the identical problem in *Petrol Shipping Corp.* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* No. 28188. There, as in this case, a sovereign entity chartered a vessel, the charter party containing substantially the same clause calling for arbitration of disputes in New York. By a divided vote of a panel differing from the one involved in this case,[9] the Second Circuit held that, upon the Greek Ambassador's suggestion of immunity, the District Court lacked jurisdiction to enter an order under § 4 of the Arbitration Act to compel the sovereign to appoint an arbitrator. 326 F. 2d 117. Subsequently, on a petition for rehearing *en banc,* the panel's determination was vacated and the matter remanded to the District Court for consideration of other issues. 332 F. 2d 370. The problem of the sovereign's waiver or submission to jurisdiction by virtue of the arbitration clause is certain to be involved again—indeed, that issue will doubtless be resolved in the light of the ultimate resolution of the instant case.

This issue thus appears to be a recurring one in the Second Circuit, where the bulk of admiralty matters arises and where arbitration frequently occurs pursuant to charter party agreements. The growing involvement of sovereign entities in the shipment of goods makes it likely that the question as to when and

[9] The panel that decided the instant case was composed of Circuit Judges Smith, Kaufman and Marshall. The panel in the *Petrol Shipping Corp.* case was Circuit Judges Swan, Clark and Marshall.

how a sovereign may be said to have submitted to jurisdiction in New York will arise with increasing frequency. This possibility, combined with the intrinsic importance of the issue and the conflict with English decisions, makes review by this Court both appropriate and compelling.

2. The conflict as to whether a federal district court can acquire jurisdiction over the person of a foreign sovereign entity by extraterritorial service of process

A serious misconception underlies the ruling below that the so-called consent to the jurisdiction of the federal court in New York—implied from the agreement to submit to arbitration in New York—made the function of extraterritorial service *solely* that of notifying petitioner of the commencement of this proceeding. Service of process is not only informational; it is also mandatory by law and, unless there is a waiver of service, the absence of proper service renders invalid the exercise of a court's jurisdiction. *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 382; *Ex parte Peru*, 318 U.S. 578, 587.

But consent to the jurisdiction of the District Court, assuming that it was here present by virtue of the arbitration clause, "does not embody or imply consent to the service of process in any manner or in any territory." Chief Judge Ryan in *Berlanti Constr. Co.* v. *Republic of Cuba*, 190 F. Supp. 126, 127 (S.D.N.Y.). As this Court noted last term in *National Rental* v. *Szukhent*, 375 U.S. 311, 316, "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." But those three possibilities are not necessarily co-

extensive, and consent to one does not by implication alone give consent to another.

In this case, the arbitration agreement said nothing whatever about waiving or consenting to service of process of a petition to compel arbitration. There was no language that can fairly be read as dispensing with the service of process which would otherwise be critical to the assertion of jurisdiction. Compare the express language involved in *Petrowski* v. *Hawkeye-Security Co.*, 350 U.S. 495, 496, where each party by stipulation "voluntarily submits to the jurisdiction of the above entitled Court without service of process herein." Indeed, to the extent that it can be said that petitioner consented to the court's jurisdiction to enforce an arbitration agreement in accordance with the Federal Arbitration Act, that consent should be read as incorporating the Act's explicit requirement that service of the petition "shall be made in the manner provided by the Federal Rules of Civil Procedure."[10] Cer-

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[10] Mr. Julius Henry Cohen, one of the leading proponents of the bill that became the Federal Arbitration Act, testified before the Joint Committee of the Senate and House Subcommittees on the Judiciary (Hearings on Arbitration of Interstate Commercial Disputes, p. 18, Jan. 9, 1924) that the court "would have to get jurisdiction just as you do now in a Federal court; by personal service . . . That would mean practically that you have to go to the jurisdiction where the defendant is, or wait until he comes into your jurisdiction so that process may be served upon him. The process is exactly the same as in civil proceedings in the Federal courts."

It should be noted that the court below, in quoting § 4 of the Federal Arbitration Act, p. 3a, fn. 3, *infra*, copied the original version of § 4 before it was amended in 1954 to provide expressly that service shall be made "in the manner provided by the Federal Rules of Civil Procedure." The opinion of the court, however, recognizes the inclusion of this express requirement. See p. 18a, *infra*.

tainly, an express mandate by Congress that service must be made pursuant to the Rules should not be considered waived in the absence of clear language to that effect. See *Olberding* v. *Illinois Central R.R. Co.*, 346 U.S. 338, 341.

The court below, despite its confusion as to the extent of the consent that it found in the arbitration agreement, recognized the necessity of service in conformity with the Federal Rules of Civil Procedure. But its holding that extraterritorial service was properly effected under those Rules on a foreign sovereign is in direct conflict with the language of those Rules as well as with the relevant judicial interpretation thereof.

Rule 4 of the Federal Rules deals with service of process in *in personam* actions. And the Seventh Circuit, in dicta that flatly contradicts the holding below, has recently stated that "Rule 4 of the Federal Rules of Civil Procedure makes no provision for service upon a foreign government." *Purdy Co.* v. *Argentina*, 333 F.2d 95, 97 (C.A. 7), petition for certiorari pending, No. 582, Oct. Term. 1964. See also *Oster* v. *Dominion of Canada*, 144 F. Supp. 746, 748-9 (N.D.N.Y.), aff'd *sub nom. Clay* v. *Dominion of Canada*, 238 F.2d 400 (C.A. 2), holding that there is no precedent under the Rules for service on a sovereign's agent and that no other authority exists for any such service.

The effort of the court below to justify the extraterritorial service here employed under Rule 4(d)(3) and under Rule 4(e) does not withstand analysis:

(1) Rule 4(d)(3), incorporated by reference into Rule 4(d)(7), permits service upon "a domestic or foreign corporation or upon a partnership or other

unincorporated association which is subject to suit under a common name" in a manner prescribed by federal law or by "the law of the state in which the district court is held." But the court did not find, nor could it find, that under either federal or New York law a sovereign entity is considered the equivalent of a foreign corporation for purposes of service of process.[11] Nor could the court find that any provision of federal or New York law permits any form of service upon a foreign sovereign.

(2) Rule 4(e), prior to its amendment in 1963, provided for service upon a party not an inhabitant of or found within the state in accordance with the manner prescribed by any applicable "statute of the United States or an order of court." The court below held that "since service was effected pursuant to Judge Dawson's order, such service complied with the terms of Rule 4(e)." See p. 18a, *infra*. But Rule 4(e), even before its 1963 amendment, was never designed to authorize a court "in an original or independent action, *in the absence of a federal statute*, to make an order for service upon a party not an inhabitant of or found within the state." 2 Moore's Federal Practice (1964) p. 1227 (emphasis in original). The 1963

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[11] Cf. Rule 4(d)(5), dealing with service upon "an officer or agency of the United States." Cf. also Rule 4(d)(6), dealing with service upon "a state or municipal corporation or other governmental organization thereof subject to suit."

Service under Rule 4(d)(3) must be made upon an officer, a managing or general agent, or "any other agent authorized by appointment or by law to receive service of process." No attempt was made in the instant case to show that the service was directed to or effected upon any such authorized agent of the Comisaria General. The petition was addressed and mailed to the Comisaria General at its address in Madrid, Spain.

amendment made this point clearer by changing the reference to read to "a statute of the United States or an order of court *thereunder*." (Emphasis added.) Hence Judge Dawson's order, unrelated to any federal statute permitting extraterritorial service upon a foreign sovereign, could not sustain service pursuant to Rule 4(e).[12]

The fact that no provision of Rule 4 permits or authorizes any form of service upon a foreign sovereign has recently been emphasized by the Department of Justice, appearing before the United States Court of Appeals for the District of Columbia Circuit on behalf of the appellee in *Hellenic Lines Limited* v. *Moore, United States Marshal*, No. 18,265, now pending for decision. In resisting an effort to compel the appellee marshal to effect service in the District of Columbia upon an agent of a foreign sovereign, the Department has advised the Court of Appeals that

> "The Federal Rules of Civil Procedure, as they presently stand, make no provision for the service of process on foreign sovereign entities. In our research of the original and subsequent commentaries of the Advisory Committee on Civil Rules we have found no reference to adjective law issues raised when attempts are made to sue

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[12] Respondent's effort to effect service pursuant to the new Rule 4(i)—a matter not resolved in the courts below—is equally unavailing. Rule 4(i) merely provides alternative methods of effecting service in a foreign country "When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held." Thus "the authority for such service [under Rule 4(i)] is to be found in Rule 4(e)." 2 Moore's Federal Practice (1964), p. 1297.3. And since in this case such authority under Rule 4(e) is lacking, service upon a foreign sovereign cannot be made under Rule 4(i).

foreign states in municipal courts. No discussion by commentators has been found. The conclusion that the draftsmen of the Rules and the members of the Advisory Committee did not contemplate suits against foreign governments is inescapable.

"The dilemma which the appellant, and others similarly situated, faces cannot be remedied by a strained reading of the existing Rules, or the judicial imposition of novel tasks upon the Department of State which—quite aside from the doctrine of separation of powers—that Department is ill-equipped to carry out. The legal vacuum in this area will have to be filled, if at all, by specific legislation." [13]

The Federal Rules of Civil Procedure, in other words, make no provision permitting any form of service upon a foreign sovereign. And the established principle that a statute or rule which would operate to divest a right or immunity will not be applied to the sovereign without express words to that effect, see *United States* v. *United Mine Workers*, 330 U.S. 258, 272-273; *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120, precludes any effort to stretch the language of the Rules or to draw implications therefrom in order to justify service upon a sovereign. Before the United States, speaking through a statute or the Federal Rules, can be said to have indicated an intention to exercise jurisdiction over a foreign sovereign through service of process, that intention should be expressed "in a manner not to be misunderstood." *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 146. Such is not the case here.

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[13] Supplemental Brief for Appellee, No. 18,265 (App. D.C.), pp. 5-6.

The recurring nature of attempts to serve foreign sovereigns and their agents in actions *in personam* makes it appropriate for this Court to make a definitive resolution of the problem. The effort in this case to achieve service by sending a registered notice by mail to the petitioner at its headquarters in Madrid, Spain, represents a particularly bold assertion of *in personam* jurisdiction, one that conceivably could have adverse international repercussions. And because the effort is so inconsistent with the language and spirit of the Rules and with the decisions thereunder, review by this Court becomes most essential.

CONCLUSION

For these reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ARTHUR M. BECKER
839 17th Street, N.W.
Washington 6, D. C.

HARRY WALLACH
475 Fifth Avenue
New York 17, New York

Counsel for Petitioner

Of Counsel:

NIXON, MUDGE, ROSE,
GUTHRIE & ALEXANDER
20 Broad Street
New York, New York

January 7, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 338—September Term, 1963.

(Argued March 10, 1964 Decided September 9, 1964.)

Docket No. 28636

VICTORY TRANSPORT INCORPORATED, owner of the S.S. HUDSON, *Petitioner-Appellee*,

v.

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, voyage charterer of the S.S. HUDSON, *Respondent-Appellant*.

Before: SMITH, KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from order compelling arbitration and denying motions to dismiss petition and vacate service, in the United States District Court for the Southern District of New York, Thomas F. Murphy, *District Judge*.

Affirmed.

CHARLES L. TROWBRIDGE, New York, N. Y. (Herbert M. Lord and Burlingham Underwood Barron Wright & White, New York, N. Y. on the brief), *for petitioner-appellee*.

EDWIN S. SHAPIRO, New York, N. Y. (Harry Wallach, New York, N. Y. on the brief), *for respondent-appellant*.

SMITH, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, *District Judge*, granting appellee's